

TUCSON ELECTRIC POWER CO.

IBLA 88-309

Decided March 15, 1990

Appeal from a decision of the Las Cruces District Manager, Bureau of Land Management, increasing rental for right-of-way NM 18691.

Affirmed in part, set aside and remanded in part.

1. Rights-of-Way: Generally--Rights-of-Way: Appraisals--Regulations: Generally--Regulations: Validity

A right-of-way rental rate schedule which employed county-wide values for calculating fair market value according to use was correctly used to calculate rental for an electric power transmission line right-of-way in conformity with provisions of 43 CFR Part 2800.

2. Rights-of-Way: Generally--Rights-of-Way: Applications-- Rights-of-Way: Federal Land Policy and Management Act of 1976--Rights-of-Way: Nature of Decision--Rights-of-Way: Nature of Interest Granted

The amendment in 1982 of two electric power transmission rights-of-way granted pursuant to the Act of Mar. 4, 1911, to form a single right-of-way 330 feet wide and approximately 17 miles long pursuant to provision of the Federal Land Policy and Management Act of 1976 resulted in the creation of a third right-of-way under the 1976 Federal Land Policy and Management Act.

3. Rights-of-Way: Appraisals

That portions of a right-of-way duplicate another grant previously obtained for a similar purpose does not entitle the grantee to a reduction of rental by subtracting the duplicated acreage from the area of the second grant.

APPEARANCES: Melvyn O. Smoot, Superintendent, Land Management, Tucson Electric Power Company, Tucson, Arizona, for appellant; Margaret C. Miller, Esq., Office of the Field Solicitor, Santa Fe, New Mexico, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Tucson Electric Power Company (TEP, the power company) has appealed from a decision of the Las Cruces District Manager, Bureau of Land Management (BLM), dated February 25, 1988, increasing rental for right-of-way NM 18691.

On April 26, 1973, BLM granted a 220-foot wide right-of-way, NM 15985, to TEP's predecessor for construction of a single 345 kilovolt (kV) electric power transmission line running across approximately 29 miles of Federal land in New Mexico. Right-of-way NM 15985 was part of a 427-mile long transmission line running from the San Juan generating station near Farmington, New Mexico, to the TEP Vail substation near Tucson, Arizona. The transmission line also crossed private land and State-owned lands over which the power company obtained a 330-foot wide right-of-way.

On May 21, 1973, TEP's predecessor filed an application with BLM for another right-of-way immediately adjacent to previously granted right-of-way NM 15985. This right-of-way, designated NM 18691, also 220 feet wide, was requested to be located parallel and over part of NM 15985 so that the entire usable width of the combined rights-of-way would total 330 feet, the same width as the right-of-way obtained by TEP for the remainder of the powerline. The stated purpose of the application was to permit construction of a second 345 kV transmission line next to the existing line.

On July 15, 1976, BLM granted right-of-way NM 18691. Right-of-way NM 18691 was 220 feet wide, but, as the application had sought, it overlapped right-of-way NM 15985 by 110 feet throughout its length. The right-of-way grant provided for rental rate determinations to be made at 5-year intervals pursuant to provision of 43 CFR 2802.1-7. The annual rental for NM 18691 was set at \$1,050 and later reduced to \$1,000 to reflect a reduction of 6.57 acres in the area of the right-of-way. Both rights-of-way were granted pursuant to the Act of March 4, 1911, 43 U.S.C. § 961 (1976), as amended, repealed effective October 21, 1976, by section 706(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), P.L. 94-579, 90 Stat. 2793 (1976).

On September 10, 1982, appellant submitted an application to BLM to amend rights-of-way NM 15985 and NM 18691 located in Catron County, New Mexico, by shifting the centerline of the combined rights-of-way 50 feet to the east, in order to permit the erection of two 345 kV transmission lines straddling the new centerline of the amended right-of-way. TEP's application explained:

The proposed modification requests (1) the shifting of the centerline of the existing 330-foot right-of-way 50 feet to the east, and (2) the use of two single-circuit 345 kV transmission structures in place of one double-circuit 345 kV transmission structure. * * * The centerline of the existing single-circuit structures would lie 60 feet from the modified western boundary of the right-of-way line. The centerline of the structures for one of the approved circuits of the second line would be located

60 feet from the modified eastern boundary of the right-of-way and the structures for the second circuit would be located in the center of the modified 330-foot corridor at 165 feet from both modified rights-of-way boundaries.

(Application dated Sept. 10, 1982, at 1). The affected area ran 17.4 miles through Catron County.

On December 7, 1982, TEP's application was approved. The decision amending the rights-of-way first stated that the application, which was approved, was to

[m]odify the location of Rights-of-way NM 15985 and NM 18691 by shifting the centerline of the existing 330-foot total right-of-way 50 feet to the east. This would entail the relinquishment of 50 feet along the west boundary of Right-of-way NM 15985 and replacing [them] with 50 feet along the east boundary of Right-of-way NM 18691. The total right-of-way width would remain the same.

(Decision dated Dec. 7, 1982, at 1). The Area Manager then acted on the application before him, concluding: "The amendments have been examined and found to be satisfactory. * * * [A] right-of-way, the details of which are shown above, is hereby granted under the Act of October 21, 1976, 90 Stat. 2776, 43 U.S.C. 1761 (Public Law 94-579)." Id. at 2.

TEP's statement of reasons (SOR) summarizes the effect of this action, concluding:

The [December 7, 1982,] modification of the rights of way resulted in release of a 50 foot width strip from the westerly line of right of way #NM 15985 and adding to the easterly line of right of way #NM 18691. In essence, the right of way remains a 330 foot width to accommodate the transmission facilities.

(SOR at 2). TEP then calculated the total acreage encompassed in the original and the amended rights-of-way to be 448.495 acres, all of which, TEP contended, should be considered to have a lower value on the rate schedule used by BLM to compute rental than was used to set the TEP rental rate, inasmuch as the land crossed by the line is, without exception, "range land" with a value of \$200 or less per acre (SOR at 3; Exh. B).

This argument is addressed to the decision issued by BLM on February 25, 1988, which determined that the rental rate for NM 18691 had been revised under provision of 43 CFR Part 2800 (1987), and the annual rental initially computed at \$10,673, using a value schedule published at 43 CFR 2803.1-2(c)(1)(i) (1987). To arrive at this preliminary rate, BLM found that 229.07 acres of the TEP transmission line located in San Juan and McKinley Counties comprised a "zone" assigned a value set under the schedule, and that 521.12 acres of the line located in Catron County were assigned a higher value, being located in a different "zone" set under the schedule established by regulation.

The system used to establish zone values is described in the answer filed in this appeal by BLM:

Zone values are based on acres by county and were established by a Secretarial decision. The public had an opportunity to propose changes in the zone values during the comment period in early 1986. However, the schedule will be adjusted annually based on the fluctuation of the Gross National Product Implicit Price Deflator Index. As the cumulative change in the index exceeds 30 percent or the change in the 3 year average of the 1 year interest rate exceeds plus or minus 50 percent, the zones and rental per acre figure will be reviewed to determine whether market and business practices have differed sufficiently from the index to warrant a revision in the base zones and rental per acre figures.

(BLM Answer, Enclosure 1). (See also 43 CFR 2803.1-2(c)(1)(ii) (1987).) The answer also explains how the schedule containing the zone value rates is to be used: "The formula used to determine acreage and rent is $\text{rent} = \text{length (no. miles of R/W feet x feet per/mile)} \times \text{width (ft) of R/W divided by acre sq. ft.} \times \text{zone schedule rate}$. Lineal distance * * * is included in the formula as part of the R/W length." Id. Under the schedule adopting the zone method for valuation, the higher the number of the zone, the higher the value assigned to the zone for purposes of rate calculation. 43 CFR 2803.1-2(c)(1)(i) (1987).

Because the revised annual rental was greater than \$100 and more than twice the prior annual rental, BLM correctly found the rental should be reduced pursuant to 43 CFR 2803.1-2(c)(2)(ii) (1987) during the first 3 years that the new rate would be in effect. (Cf. Tucson Electric Power Co., 111 IBLA 69 (1989).) Therefore, using the schedule provided for this purpose, BLM "phased-in" the rental for the period July 15, 1988, through December 31, 1989, at the reduced amount of \$6,929 (Decision dated Feb. 25, 1988, at 1).

TEP contends that it was error to assign a zone value higher than zone 2 to any of the lands crossed by the powerline, and that it was error to establish rental for NM 18691 as though it were 220 feet wide throughout its entire length despite the 1982 modification of approximately 17 miles of the right-of-way. BLM admits that the rental rate was calculated assuming that the right-of-way remains 220 feet wide throughout its length and assumes that both NM 15985 and NM 18691 continue in existence as issued. This position is explained on the theory that "appellant has not simply obtained an amendment to a single, existing right-of-way, but has obtained a second right-of-way with additional attendant costs of administration" (BLM Answer at 1). Concerning use of the schedule to establish the rental in this case, BLM argues that zone values were set for the various counties of New Mexico by rulemaking, and that BLM is obliged to follow the rules published at 43 CFR Part 2800 and implementing Instruction Memoranda which establish higher right-of-way rental rates for Catron County than for San Juan and McKinley Counties. Id.

Rights-of-way NM 15985 and NM 18691 were initially issued pursuant to the Act of March 4, 1911, 43 U.S.C. § 961 (1976). Prior to repeal of that Act, rental charges were calculated on the basis of the fair market value of the right-of-way, which was determined by a BLM appraisal. 43 CFR 2802.1-7(a) (1975). The regulation applied to determine the new rate, 43 CFR 2803.1-2(a) (1987), provides for the collection of fair market rental value, determined pursuant to 43 CFR 2803.1-2(c) (1987), which includes a schedule establishing values by zone for right-of-way rental fees. 43 CFR 2803.1-2(a) (1987) does not reduce rights granted pursuant to the Act of March 4, 1911. Mountain States Telephone & Telegraph Co., 107 IBLA 82, 86 (1989).

[1] TEP does not contend that the regulations published at 43 CFR Part 2800 cannot be applied to the entire length of the powerline located on Federal rights-of-way, but argues that no land crossed by the TEP powerline is worth more than \$200 per acre. We rejected this argument when it was raised by TEP in Tucson Electric Power Co., *supra*, for the reason that the objection was not timely raised, the propriety of the method being challenged having been previously established by rulemaking, as described by the opinion in Tucson Electric Power Co., *supra* at 74. Our decision in Tucson Electric Power Co. is controlling on this issue. Insofar as this appeal concerns use by BLM of the rental schedule established by regulation, therefore, we find that the value of lands crossed by the powerline was properly established using county-wide zone values established by the rental schedule published in 43 CFR Part 2800. *Id.* Regardless whether all or part of the right-of-way for the TEP powerline was issued under the 1911 Act or was issued pursuant to FLPMA, 43 U.S.C. § 1761 (1982), the regulations and rate schedule at 43 CFR Part 2800 were properly applied to determine the rental rate. Tucson Electric Power Co., *supra*.

[2] Unlike the situation described in Tucson Electric Power Co., *supra*, however, rights-of-way NM 15985 and NM 18691 were the subject of an amendment in 1982 which by its terms established a right-of-way issued pursuant to FLPMA, 43 U.S.C. § 1761 (1982), for 17.4 miles of the powerline right-of-way located in Catron County. TEP requested that the east boundary of right-of-way NM 18691 be extended 50 feet and the west boundary of NM 15985 be contracted by 50 feet, an action that would have created two separate rights-of-way with a 110-foot overlap. Nonetheless BLM issued a new right-of-way pursuant to FLPMA, 330 feet in width for the right-of-way in Catron County, a distance of 17.4 miles. This action is consistent with the provisions of BLM's manual dealing with amendments of rights-of-way. Concerning such action, the manual requires that authorizations for expanded use by a project using a pre-FLPMA grant

usually will require new authorization for at least the additional land. Application for such authorization shall be filed under FLPMA and should include lands as described below.

(1) The application may be for the entire project if the applicant/holder is willing to relinquish the pre-FLPMA grant and reauthorize the project under one FLPMA grant.

(2) The FLPMA application may involve (a) only the additional land or (b) that part of the grant subject to the change in use or both (a) and (b). The project would then be authorized under two grants: one pre-FLPMA grant and one new FLPMA grant. If it is to the public benefit, i.e., better environmental protection under FLPMA, FLPMA rental can be reduced to pre-FLPMA levels to induce the holder to convert the authorization.

(BLM Manual 2801.45F2b).

The 1982 amendment appears to have been intended to affect only the 17.4 miles of the rights-of-way located in Catron County, "that part of the grant subject to the change in use." Id. The 1982 amendment therefore must have substituted the FLPMA right-of-way for the portions of NM 15985 and NM 18691 previously located in Catron County. The effect of this action was to eliminate the 110-foot overlapping section of those prior rights-of-way, although the rights-of-way issued pursuant to the 1911 Act were not explicitly cancelled nor was a new serial number assigned to the 1982 FLPMA grant. It can be presumed that Government employees performed their official duties in a regular manner consistent with rules governing such performance, and that the 1982 decision means what it says: that a right-of-way pursuant to provision of FLPMA was issued on that date, 330 feet wide over a distance of 17.4 miles in Catron County. (See, Carmelita M. Holland, 87 IBLA 175 (1985), holding that the presumption of regularity which attends the official actions of public officers in the discharge of their duties overcame the assertion by a mining claimant that he had filed a recordation document when no such document appeared in BLM's files.)

[3] Citing Instruction Memorandum No. 87-589, Change 1, dated August 8, 1987, BLM contends that TEP must pay rental for all land in each granted right-of-way, and that it is irrelevant that some land may be included in more than one grant. The applicable regulation, 43 CFR 2803.1-2(c)(1)(iv) (1987) provides that "rental for the ensuing calendar year for any single right-of-way grant or temporary use permit shall be the rental per acre from the current schedule times the number of acres in the grant." Nothing in the regulations prohibits an applicant for a right-of-way from applying for a grant which duplicates part of another grant already obtained. When multiple use of a single site occurs, BLM properly charges each user rental at fair market value for the grant, despite the duplication. Circle L, Inc., 36 IBLA 260 (1978). The fact that duplication occurs in the case of grants issued to the same user does not change the rule: the regulations require that fair market value be assessed for each grant, and, in this case that rental be calculated on a schedule allowing a charge for the acreage contained in each grant. So far as concerns the portion of NM 18691 which was not affected by the 1982 amendment, therefore, BLM's decision establishing increased rental must be affirmed. This leaves the matter of rental rate for the amended right-of-way issued in 1982 to be decided on remand.

The arguments raised by appellant suggest that it may have been the intention of TEP to obtain amendment of the entire right-of-way embraced

by NM 18691 and NM 15985 by creation of a single grant similar to that issued in 1982 for the 17.4-mile segment of the Catron County grant. A similar situation was dealt with in our decision in Tucson Electric Power Co., supra, where we observed that arguments raised on appeal indicated that an amendment of the right-of-way might be appropriate to eliminate duplication in existing grants like that between NM 18691 and NM 15985, provided that was what the power company sought. Tucson Electric Power Co., supra at 76. Since remand of this case file is required to determine rental for the Catron County lands affected by the 1982 amendment and to permit BLM to assign an identification number to this right-of-way, consideration may also be given to whether amendment of the remainder of NM 18691 should also be made pursuant to FLPMA, should TEP desire such amendment. Id. Any such right-of-way must, of course, be issued pursuant to FLPMA.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Las Cruces District Office is affirmed in part, and set aside and remanded in part for further action consistent with this decision.

Franklin D. Arness
Administrative Judge

I concur:

James L. Burski
Administrative Judge